

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIL SCOTT MILLER,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 263351

Wayne Circuit Court

LC No. 03-012896-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant claims an appeal from his sentence of eight to 15 years in prison imposed on his underlying conviction of second-degree home invasion, MCL 750.110a(3), after his conviction of probation violation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was found guilty of second-degree home invasion after a bench trial. The statutory sentencing guidelines recommended a minimum term range of 12 to 24 months. The trial court sentenced defendant to serve two years' probation, with the first six months in jail. Defendant received credit for 65 days previously served in jail.

Subsequently, defendant was charged with felony-murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, three counts of assault with intent to rob while being armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was convicted and was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of life without parole for felony murder, six to ten years for assault with intent to do great bodily harm less than murder (as a lesser included offense of assault with intent to commit murder), 28 to 50 years for each of his three convictions of assault with intent to rob while being armed, and three to five years for felon in possession of a firearm. He also received a consecutive two-year term for felony-firearm.¹

¹ In *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 263350), this Court affirmed defendant's convictions and sentences for the
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Defendant was convicted of violating his probation in the instant case by committing the new offenses. In revoking defendant's probation and imposing the sentence in this case, the trial court noted that defendant had been convicted of new and extremely serious offenses, including murder. The trial court sentenced defendant to eight to 15 years in prison for second-degree home invasion, to be served concurrently with his other sentences.²

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005).

A trial court may depart from the established guidelines if it has a substantial and compelling reason to do so and clearly articulates that reason on the record. MCL 769.34(3). To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 256-258; 666 NW2d 231 (2003). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure. *Id.* at 259-260.

The determination of the existence of a factor for departing from the guidelines is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed de novo, and the determination that objective and verifiable factors merited departure from the guidelines range is reviewed for an abuse of discretion. *Id.* at 264-265. An abuse of discretion exists when the trial court makes a choice that is not within the range of principled outcomes. *Id.* at 269-270. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. See MCL 769.34(3)(b).

Defendant argues that the trial court erred by exceeding the guidelines range of 12 to 24 months for his underlying offense of second-degree home invasion and imposing a minimum term of eight years for that offense without articulating substantial and compelling reasons for doing so. We disagree.

Defendant violated his probation by committing new and violent offenses. A violation of probation can constitute a substantial and compelling reason for exceeding the guidelines when imposing sentence on the underlying offense. *Hendrick*, *supra* at 557. Defendant's commission of new and violent offenses, including murder, was objective and verifiable, and irresistibly attracted the attention of the court. These new offenses were not accounted for in the calculation of the guidelines. The trial court did not abuse its discretion by concluding that defendant's commission of new and extremely serious offenses warranted a substantial departure from the

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additional offenses.

² The trial court failed to inform defendant that he had the right to appeal his sentence based on the departure from the guidelines, as required by MCL 769.34(7). However, because defendant has appealed based on the departure, the error is harmless. *People v Hicks*, 259 Mich App 518, 537; 675 NW2d 599 (2003).

guidelines. The particular departure at issue did not result in a disproportionate sentence. *Babcock, supra* at 261-264; *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1999).

The trial court's reason for imposing the sentence that it did, i.e., defendant's commission of new and extremely serious offenses, was stated on the record with less than absolute clarity. Nevertheless, we find that the statement was sufficient, and therefore we affirm defendant's sentence.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood